

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**No. 26-1899**

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NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs-Appellees

and

STATE OF OREGON, et al.,

Intervenors-Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants-Appellants,

and

PUBLIC POWER COUNCIL, et al.,

Intervenor-Defendants-Appellants.

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**PUBLIC POWER COUNCIL RESPONSE TO MOTION FOR STAY**

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## INTRODUCTION

Intervenor-Defendant Public Power Council (“PPC”) hereby provides this Response in Support of the Federal Defendants’ Motion for a Stay Pending Appeal (ECF 8) (“Motion”). Federal Defendants have fully briefed the standard for this Court to consider in deciding whether to grant a stay, and PPC will not repeat an analysis of all the required elements. Rather, PPC – as the primary representative of the consumer-owned utilities that rely on power from the federal Columbia River System of hydroelectric dams (“CRS”) – writes to emphasize two points.

First, a stay pending appeal is required to avoid impending irreparable harm to the Northwest’s electric power system and the people who rely on it. This summer is forecasted to be hot and dry, meaning high demand for electricity and low water in late summer for power generation. The preliminary injunction will exacerbate this problem and increase the likelihood of potential power supply shortages, which could impose additional health risks on vulnerable communities.

Second, a stay is warranted because the preliminary injunction simply is not necessary to avoid irreparable harm to threatened fish species under the Endangered Species Act (“ESA”). The District Court failed to meaningfully engage with the evidence in the record that demonstrated a preliminary injunction was not necessary. As importantly, the District Court also failed to rationally connect key terms of the preliminary injunction to the articulated standard – again,

whether the relief granted was “necessary” under the ESA. This lacuna in the District Court’s order belies the fact that the preliminary injunction was not necessary.

For the reasons set forth in the Federal Defendants’ Motion and those explained below, the Court should grant the Motion and stay the District Court’s preliminary injunction pending appeal.

### **BACKGROUND**

PPC is a nonprofit corporation that represents the interests of approximately 100 consumer-owned utilities (municipal utilities, public and peoples’ utility districts, and cooperatively owned utilities, all of which fall under the broader umbrella term “consumer-owned utilities”). Dist. Ct. Dkt. 2554, Decl. Simms at 3. The governing boards of PPC’s member utilities consist of elected officials, and these utilities are ultimately responsive to their communities. Unlike investor-owned utilities, which earn a return on their capital investments that generates profit for shareholders, consumer-owned utilities are legally required to pass their costs through to their customer-constituents – there are no investors and no profits.

As electric utilities, PPC’s members have a duty to maintain reliable power for their customers. Modern life would not be possible without a robust electricity grid, and power outages can and do cause tremendous harm and even deaths – particularly in today’s world, where outages correspond with extreme weather and

can prevent life-saving cooling in the summer or heating in the winter. *See, e.g.,* Brian Stone et al., *How Blackouts during Heat Waves Amplify Mortality and Morbidity Risk*, *Env. Sci. Tech.* (May 2023), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC10249403/>. Additionally, electric utilities that use, own, or operate parts of the “bulk power system” are subject to binding reliability standards under federal law, enforceable by the North American Electric Reliability Corporation (“NERC”). *See S. Carolina Pub. Serv. Auth. v. Fed. Energy Reg. Comm’n*, 762 F.3d 41, 79 (D.C. Cir. 2014); *Alcoa Inc. v. Fed. Energy Reg. Comm’n*, 564 F.3d 1342, 1344-45 (D.C. Cir. 2009).

To obtain reliable power for their retail customers, PPC’s member utilities are wholesale preference customers of the Bonneville Power Administration (“BPA”), which markets power from the CRS hydroelectric dams. The Northwest Power Act, 16 U.S.C. § 839 *et seq.*, incorporates the statutory preference provision of the Bonneville Project Act, 16 U.S.C. § 832 *et seq.*, which requires BPA to give priority to consumer-owned utilities in the sale of CRS power. PPC’s member utilities receive CRS power from BPA under long-term power sales contracts required by the Northwest Power Act. 16 U.S.C. § 839c(b).

PPC has long fought to continue and enhance access to reliable, low-cost, zero-emissions CRS power for its members and to ensure BPA and all PPC members adhere to all ESA requirements. Dist. Ct. Dkt. 2554, Decl. Simms at 5-6.

PPC has worked for many years to ensure the region’s power needs are met alongside adherence with the ESA. *See, e.g., Idaho Dep’t of Fish & Game v. Nat’l Marine Fisheries Serv.*, 850 F.Supp. 886, 900 (D. Or. 1994). This work has included consistent support for fish recovery funding. Dist. Ct. Dkt. 2554, Decl. Simms at 7-8. PPC’s involvement in this case represents an effort to support recovery for threatened and endangered fish species while maintaining affordable, reliable, zero-carbon power for its members and their customers.

## ARGUMENT

### **I. A stay is required to avoid irreparable harm to the Northwest’s electric power system and the people that rely on it.**

A stay pending appeal is required because the District Court’s preliminary injunction threatens to undermine the region’s power supply and the reliability of the electricity grid – and the people and institutions that rely on it – during a period that is increasingly shaping up to be risky from a power perspective.

This summer is forecasted to be hot and dry, resulting in high demand for electricity and low water in late summer for power generation. When the parties briefed and argued the requested preliminary injunction in the fall and winter months, it was unknown what to expect from summer 2026. Since then, we have learned more. Following the February hearing before the District Court, the winter remained warm and dry, giving Oregon “the lowest snowpack in the Pacific Northwest and its second-lowest level on record.” Kale Williams, *Oregon’s*

*snowpack falls near record lows*, Axios (Mar. 17, 2026), available at <https://www.axios.com/local/portland/2026/03/17/oregon-snowpack-near-record-lows-warm-winter>. The same is true for Washington – the winter was warm and dry, and snowpack is historically low. Bellamy Pailthorp, *El Niño, marine heat will likely make Washington’s warm year even warmer*, KNKX (Mar. 29, 2026), available at <https://www.knkx.org/environment/2026-03-29/el-nino-marine-heat-will-likely-make-washingtons-warm-year-even-warmer>; see also Lizzy Acker, *Oregon’s snowpack just broke a terrifying record, and the consequences could be devastating this summer*, The Oregonian (Apr. 10, 2026), available at <https://www.oregonlive.com/weather/2026/04/oregons-snowpack-just-broke-a-terrifying-record-and-the-consequences-could-be-devastating-this-summer.html>.

The summer forecast promises more of the same. The National Oceanic and Atmospheric Administration has determined that “[i]n May-July 2026, El Niño is likely to emerge (61% chance) and persist through at least the end of 2026.” Climate Prediction Center/NCEP/NWS, *El Niño/Southern Oscillation (ENSO) Diagnostic Discussion* (Apr. 9, 2026), available at [https://www.cpc.ncep.noaa.gov/products/analysis\\_monitoring/enso\\_advisory/enso\\_disc.shtml](https://www.cpc.ncep.noaa.gov/products/analysis_monitoring/enso_advisory/enso_disc.shtml). News reports have explained what this means: “even more above-average temps ... lower streamflows, potential stress on water supplies, an increased risk of wildfires and a longer fire season.” Pailthorp, KNKX.

Hot summers and low water significantly stress the hydroelectric system and potentially the electric grid as a whole. Hot summers impose more demand on the system, as homes, businesses, hospitals, and even cooling centers must lean more heavily on power for air conditioning and other cooling. Low water limits the ability of the hydroelectric system to generate power. When the region has both at once, the federal government must carefully manage the CRS to ensure adequate power supply to the extent possible. The preliminary injunction, however, requires additional spill of the region’s limited water supply, which is the necessary “fuel” for the hydroelectric system. When this water is simply spilled, it cannot be used for power generation – including during periods of high heat and low fish passage. *See Amended Opinion and Order, Dist. Ct. Dkt. 2673, at 41.* This harms the region’s electric grid – and therefore PPC, its members, and the communities that they serve – without bringing any significant attendant benefits.

The region cannot simply lean on other generating resources to fill the gap left by missing hydroelectric generation, because it is already in a capacity crunch. As PPC explained in the declaration of Dr. Joshua Rasmussen submitted to the District Court in December 2025, accounting for both actual demand and an industry-standard planning reserve margin, “[o]n a stand-alone basis the [Northwest] is currently deficient about 4,000 MW.” *Dist. Ct. Dkt. 2556, Decl. Rasmussen at 8.* This gap is currently growing, *Decl. Rasmussen at 7-11*, so the

deficiency is likely even greater than existed at the time of Dr. Rasmussen's analysis. Supply deficiencies can and do lead to blackouts. Additionally, even if federal power marketers and PPC's members are able to obtain replacement power, possibly by importing it from outside the region – which is by no means a given – this power will be significantly more expensive. Decl. Rasmussen at 20-24.

It should not be lost in this discussion that power-sector emissions are a driver of climate change that is causing both fish mortality and extreme weather. By curtailing zero-carbon hydroelectric generation and driving Northwest utilities to more emissions-intensive replacement power,<sup>1</sup> the District Court's preliminary injunction will result in higher emissions that will harm fish. Decl. Rasmussen 24-25. This emissions increase is one of the central ironies of Plaintiffs' efforts in this litigation and the District Court's preliminary injunction. It is also yet another harm that a stay is necessary in order to avoid.

To sum it all up, there is substantial evidence that the remainder of 2026 will be hotter than normal with significantly lower late summer streamflows; that these forecasted conditions, on their own, present significant risks to CRS power generation; that the preliminary injunction ordered by the District Court exacerbates these risks; and that the Court's injunction thus substantially increases

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<sup>1</sup> Development of wind and solar resources is not keeping pace with demand, especially in Washington and Oregon. Decl. Simms at 10.

the risk of serious harm to the public through blackouts for communities, hospitals, schools, and farms throughout the region. Put more starkly, the injunction risks more people dying from air conditioning being cut off when needed, from essential medical devices shutting down due to the power going out, from serious traffic accidents when stoplights stop working – all clearly irreparable but distinctly avoidable if the preliminary injunction is stayed. To be clear, PPC is not saying these things definitively will happen absent a stay pending appeal. Rather, PPC is saying that the risk that these things will occur is significantly higher absent a stay pending appeal. Based on the evidence, it is certainly more likely that the region suffers adverse power system impacts as a result of the preliminary injunction than it is that threatened fish species will be imperiled if this Court grants a stay pending appeal.

**II. The challenged preliminary injunction is not necessary to avoid irreparable harm to threatened species.**

A stay pending appeal also is warranted because the preliminary injunction ordered by the District Court simply is not necessary in this case. In finding otherwise, the District Court failed to meaningfully engage with the ample evidence in the record supporting a conclusion that the Federal Defendants' proposed action – which would be implemented absent a preliminary injunction – would be fully consistent with the ESA. The District Court also failed to rationally

connect key terms of the preliminary injunction to the articulated standard – whether the relief granted was “necessary” under the ESA.

As a starting point, the federal government submitted over twenty declarations discussing the CRS issue from a variety of complex angles, including both fish and power impacts of different operational choices. As to spill, the District Court dismissed the entirety of the evidence out of hand, saying only: “The evidence submitted by the Federal Defendants challenging the benefits of spill primarily was created for this litigation and is contrary to the established scientific evidence in the record. The Court gives it little weight.” Amended Opinion and Order at 40. It is unclear why the fact that the declarations were “created for this litigation” should matter – the Plaintiffs’ declarants presumably created their declarations “for this litigation” as well. As to the notion that the evidence was “contrary to the established scientific evidence in the record[,]” respectfully, the District Court got it wrong.

PPC’s declarant on spill, Dr. Andrew Deines, focused his testimony on the limits and bounds of the scientific conclusions that could be drawn from the Plaintiffs’ declarations and the scientific literature underlying those declarations. *See generally* Dist. Ct. Dkt. 2555, Decl. Deines. Dr. Deines explained that the evidence suggested benefits from spill to a point, but that the terms of the requested preliminary injunction went beyond that point and into the realm of

unproven speculation. *See, e.g.*, Decl. Deines at 10 (“Plaintiffs’ requested relief amounts to an *experiment* in fish passage[.]”).

This is particularly true for August spill. At PPC’s request, following the February hearing on the Motions for Preliminary Injunction, the District Court directed the parties to attempt to reach agreement on a set of reasonable terms for an injunction. Among PPC’s areas of focus was August spill. *See generally* Dist. Ct. Dkt. 2663, Joint Defendant-Intervenors Submission Regarding Revised Proposed Order. PPC focused on this for three main reasons: 1) August is a particularly risky month from a power perspective where electricity demand is high and generating supply in the Northwest is usually reduced, as it is hot and dry and water reservoirs are often depleted; 2) fish passage in August is low, so impacts to power would be significant but impacts to fish insignificant;<sup>2</sup> and 3) the Plaintiffs had previously agreed to reduced August spill. Specifically, under the terms of an agreement that had been in place from December 2023 until the federal government withdrew last year – the “Resilient Columbia Basin Agreement” – the Plaintiffs had agreed to allow the hydroelectric dams to operate in August with

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<sup>2</sup> Dr. Deines presents data from the Army Corps of Engineers’ 2025 Fish Passage Plan in Figure 2 of his Declaration. Decl. Deines at 7. This Figure shows passage concentrated in April and May, tapering in the first half of June, with very limited passage in August. The source material is reliable – Plaintiffs’ primary declarant on fish passage, Mr. Bowles, also cites to Fish Passage Plan data. *See generally* Dist. Ct. Dkt. 2531, Decl. Bowles; Dist. Ct. Dkt. 2624, Repl. Decl. Bowles.

reduced spill levels for 10 years. *See generally* Dist. Ct. Dkt. 2450-1, Resilient Columbia Basin Agreement; *see also* Dist. Ct. Dkt. 2526, NWF’s Motion for Preliminary Injunction at 19 (explaining that Plaintiffs agreed to “a dramatic curtailment of summer spill beginning August 1”).

When the federal government withdrew from the Resilient Columbia Basin Agreement, however, Plaintiffs suddenly did an about-face on August spill and started taking the position that it was somehow necessary to prevent irreparable harm within the time period contemplated by the preliminary injunction – summer 2026. Plaintiffs’ explanation for the necessity of August spill is weak and directly in conflict with the requirement that a preliminary injunction be narrowly tailored. Dist. Ct. Dkt. 2526, NWF Motion at 55 (“Providing summer spill through the entire summer migration season is important to preserve as much of the diversity of summer migrating juveniles as possible, and increase their resilience in the future.”). That is not sufficient for a showing of irreparable harm.

Unsurprisingly, then, when it granted Plaintiffs’ requested August spill, the District Court struggled to articulate why it thought such relief was appropriate, let alone necessary. The Court’s original Opinion and Order incorrectly stated that it was simply mirroring the terms of the Resilient Columbia Basin Agreement concerning August spill. *See* Dist. Ct. Dkt. 2667, Opinion and Order at 41. After PPC pointed out in a Motion for Reconsideration that this was incorrect because

that Agreement provided for spill only through July 31, Dist. Ct. Dkt. 2671, the Court denied PPC's Motion for Reconsideration and instead issued an Amended Opinion and Order reflecting the Agreement's end date for spill. Dist. Ct. Dkt. 2673. However, the resulting reasoning in the Amended Opinion and Order makes little sense with respect to ordering August spill here – it says that the Resilient Columbia Basin Agreement allowed high spill levels through July 31 (not August) and that the Court before, more than 20 years ago, once ordered August spill. Dist. Ct. Dkt. 2673 at 41. If the District Court had engaged with the full suite of evidence provided to it, it may well have come up with more reasonable injunction terms, or found that an injunction was unnecessary.<sup>3</sup> Instead, it did neither.

As a result, August spill is just one particularly stark example of the lack of connection between the evidence in the record and the terms of the District Court's Preliminary Injunction. It is also an example of why the preliminary injunction is not necessary to protect threatened fish species, and a stay is appropriate.

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<sup>3</sup> PPC appreciates that this portion of the Amended Opinion and Order was issued “without prejudice to any defendant to seek modification if problems arise due to spill levels in August.” Amended Opinion and Order at 41. While well-intended, this clarification would likely be difficult to implement in practice due to the way the CRS is actually operated, with water managed throughout the summer to try to account for needs later in time. Put simply, the Court's order regarding August spill could well lead to power shortfalls in June, not just in August.

## CONCLUSION

For the reasons set forth in the Federal Defendants' Motion and those explained above, the Court should grant the Motion and stay the District Court's preliminary injunction pending appeal.

Date: April 16, 2026

*/s/ Irion Sanger* \_\_\_\_\_

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## CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on April 16, 2026, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

Date: April 16, 2026

*/s/ John Maxwell Greene* \_\_\_\_\_

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